

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

THOMAS MICHAEL BENHOFF,
Plaintiff,
v.
UNITED STATES DEPARTMENT
OF JUSTICE; ALANA ROBINSON,
Acting United States Attorney,¹
Defendants.

CASE NO. 16CV1095-GPC(JLB)

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

[Dkt. Nos. 20, 22.]

Before the Court is Defendants' motion for summary judgment and Plaintiff's cross-motion for summary judgment. (Dkt. Nos. 20, 22.) Plaintiff filed an opposition to Defendants' motion for summary judgment.² (Dkt. No. 23.) Defendants then filed an opposition to Plaintiff's motion for summary judgment and a reply in support of their motion for summary judgment. (Dkt. No. 28.) Plaintiff filed a reply to Defendants' opposition on March 1, 2017. (Dkt. No. 29.) The motions are submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1). Based on

¹On January 6, 2017, Alana Robinson was appointed Acting U.S. Attorney for the Southern District of California. Pursuant to Federal Rule of Civil Procedure 25(d), Alana Robinson, Acting U.S. Attorney is substituted for U.S. Attorney Laura Duffy as a defendant in this case.

²On January 18, 2017, Plaintiff filed a notice of errata informing the Court that he inadvertently referred to himself as a Defendant instead of the Plaintiff on page 2 of his motion. (Dkt. No. 25.)

1 the reasoning below, the Court GRANTS Defendants' motion for summary judgment
2 and DENIES Plaintiff's motion for summary judgment.

3 **Background**

4 Plaintiff Thomas Michael Benhoff ("Plaintiff"), proceeding *pro se*, is currently
5 in custody in the San Diego County Jail facing a charge, *inter alia*, of alleged
6 possession of six images of "child pornography" in violation of California Penal Code
7 section 311.11 in San Diego Superior Court in the case of People v. Benhoff,
8 SCN324140. (Dkt. No. 1, Compl. ¶ 1.) Defendant United States Department of Justice
9 ("DOJ") is a federal governmental agency in possession of the documents sought by
10 Plaintiff. (Id. ¶ 2.) Defendant Alana Robinson is the Acting United States Attorney
11 for the Southern District of California, who has the ultimate authority for the denial of
12 a FOIA request. (Id. ¶ 3.)

13 Plaintiff faxed a state court subpoena to the FBI on November 17, 2015 seeking
14 records for use in defending against the child pornography charges. (Dkt. No. 20-2,
15 Hoffman Decl., Ex. A.) In that subpoena, he requested the "results of investigations
16 whether 'iceporn.com' contains child pornography, whether those results were positive
17 or negative. Of course, all confidential information redacted." (Id.) In a letter dated
18 November 30, 2015, the U.S. Attorney's office responded, on behalf of the FBI, and
19 informed Plaintiff that his requests are governed by the Department of Justice's Touhy³
20 regulations, 28 C.F.R. §§ 16.21-16.27 and in order to invoke those procedure Plaintiff
21 must provide a "summary of the information sought and its relevance to the
22 proceeding" in accordance with those regulations. (Id., Ex. B at 8.) In response, in a
23 letter dated January 14, 2016, Plaintiff requested the following information,

24 1. Any information you have, and can provide me, with respect to
25 whether the person photographed in each of the images was, or was
not, under 18 years of age at the time the photograph was taken.

26 2. Any information you have, and can provide me, as to whether or not
27 any of the images were photo-shopped, altered, or otherwise
reconstructed in any manner.

28 _____
³United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

1 3. Because image 1328453.jpg apparently has no “metadata”
 2 (according to my expert), whether you know the age of the person in
 3 the image at the time it was taken- i.e., through identical or similar
 4 images taken of her on or about the same date, or through any other
 5 sources.

6 4. Whether, as far as you know, sexual photographs of Ms. Amal Liu
 7 (Attachment B) were ever taken of her when she was under 18 years of
 8 age. (It is my expert's belief that she has only done this as an adult.)

9 5. Any information you have, and can provide me, with respect to
 10 whether any of the images are illegal child pornography under federal
 11 law, and if so, which ones.

12 6. Any information you have, and can provide me, as to whether or not
 13 the website “iceporn.com” ever contained images of child
 14 pornography, in particular in July, 2013.

15 7. Any information you have, and can provide me, as to whether or not
 16 the website(s) from which iceporn.com derived the images ever
 17 contained images of child pornography.

18 8. Whether or not you know of any websites (I do not need them named
 19 specifically), in particular ones operating in July, 2013, which stated
 20 on their home page words to the effect that the website was compliant
 21 with 18 U.S.C. § 2257, that “all models are over 18 years of age,” or
 22 similar disclaimer, when the website in fact contained child
 23 pornography.

24 9. If you do know of any websites that claimed on their home page to
 25 be compliant with 18 U.S.C. § 2257 but in fact contained child
 26 pornography, what is the relative frequency, or rarity, of such false
 27 disclaimers, i.e., as an approximate percentage of the false-disclaimer
 28 websites to websites which state the disclaimers truthfully.

(Id., Ex. C at 13-14.) Plaintiff also sought “crime data reflecting the number and/or
 percentage of people charged with indecent exposure of and also with possession of
 child pornography.” (Id. at 14.) In a letter dated February 4, 2016, Defendants
 provided a response and declined to provide the information Plaintiff requested. (Id.,
 Ex. D.)

On May 2, 2016, Plaintiff filed the instant complaint alleging causes of action
 under the Freedom of Information Act (“FOIA”) and the Administrative Procedures
 Act (“APA”) to compel the disclosure of non-exempt documents which Plaintiff sought
 and Defendants refused to produce. (Dkt. No. 1, Compl.)

On November 29, 2016, the Court granted in part and denied in part Defendants’

1 motion to dismiss for lack of jurisdiction. (Dkt. No. 18.) The Court dismissed the
2 FOIA claim for lack of subject matter jurisdiction because Plaintiff had not
3 demonstrated he exhausted administrative remedies and dismissed Defendants AUSA
4 Hoffman as not “an appropriate officer” under the APA. (Dkt. No. 18.) The remaining
5 claim on summary judgment is under the APA.

6 **Discussion**

7 Defendants move for summary judgment on the APA cause of action arguing
8 that they provided a rational basis for its decision not to provide Plaintiff with records
9 regarding child pornography investigations determining that compliance would reveal
10 investigative records that would interfere with enforcement proceedings or disclose
11 investigative techniques, would be burdensome and would not be an efficient use of
12 federal government resources. Plaintiff moves for summary judgment arguing that the
13 information he seeks is not privileged or restricted in any way and production of those
14 records would not interfere with enforcement proceedings or disclose investigative
15 techniques. According to Plaintiff, the requested materials are directly exculpatory and
16 would allow him to prove his factual innocence in the state criminal proceedings. In
17 reply, Plaintiff asserts that the state prosecutor received the alleged images of child
18 pornography from his laptop from FBI agent, David Iorillo, who works on a joint task
19 force with state authorities. (Dkt. No. 29 at 4.)

20 **A. Standard of Review**

21 The Administrative Procedures Act governs judicial review of agency actions
22 under the Touhy regulations. See COMSAT Corp. v Nat’l Science Fdn., 190 F.3d 269,
23 277 (4th Cir. 1999) (in the context of an agency’s response to a third-party subpoena,
24 “the proper method for judicial review of the agency's final decision pursuant to its
25 regulations is through the Administrative Procedure Act.”).

26 The Administrative Procedure Act authorizes judicial review where a person
27 “suffer[s] legal wrong because of agency action, or [is] adversely affected or aggrieved
28 by agency action within the meaning of [the] relevant statute.” 5 U.S.C. § 702. An

1 agency's decision must be upheld under judicial review unless the court finds that the
 2 decision or action is "arbitrary, capricious, an abuse of discretion, or otherwise not in
 3 accordance with law." 5 U.S.C. § 706(2)(A). An agency decision may also be set aside
 4 if the decision is "contrary to constitutional right, power, privilege, or immunity." Id.
 5 § 706(2)(B). The standard is "highly deferential, presuming the agency action to be
 6 valid and affirming the agency action if a reasonable basis exists for its decision." Nw.
 7 Ecosystem Alliance v. U.S. Fish and Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir.
 8 2007) (citation omitted). Agency action is valid if the agency "considered the relevant
 9 factors and articulated a rational connection between the facts found and the choices
 10 made." Arrington v. Daniels, 516 F.3d 1106, 1112 (9th Cir. 2008) (citations omitted);
 11 see also Nat'l Wildlife Fed v. U.S. Army, 384 F.3d 1163, 1170 (9th Cir. 2004) (an
 12 agency must present a "rational connection between the facts found and the
 13 conclusions made."). A court's review of an agency decision under the APA is
 14 "narrow and [a court] may not substitute [its] judgment for that of the agency." Mt. St.
 15 Helens Mining & Recovery Ltd. Partnership v. U.S., 384 F.3d 721 (9th Cir. 2004). The
 16 burden is on Plaintiff to show any decision or action was arbitrary and capricious. See
 17 Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976).

18 A court's review of an agency decision typically is limited to the administrative
 19 record. Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988). "The
 20 task of the reviewing court is to apply the appropriate APA standard of review, 5
 21 U.S.C. § 706, to the agency decision based on the record the agency presents to the
 22 reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).
 23 However, the Ninth Circuit has allowed the scope of the record to be expanded

24 (1) if necessary to determine "whether the agency has considered all
 25 relevant factors and has explained its decision," (2) "when the agency
 26 has relied on documents not in the record," or (3) "when
 supplementing the record is necessary to explain technical terms or
 complex subject matter.

27 Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir.
 28 1996) (quoting Inland Empire Public Land Council v. Glickman, 88 F.3d 697, 703 (9th

1 Cir. 1996)).

2 The head of an executive department may promulgate procedural regulations
3 governing “the custody, use and preservation of its records, papers and property.” 5
4 U.S.C. § 301. The Department of Justice promulgated regulations known as the Touhy
5 regulations which provide the procedure to request testimony or documents. See 28
6 C.F.R. §§ 16.21-16.27; United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468 (1951)
7 (approving Department of Justice regulations requiring the Attorney General’s
8 approval before employees could release official documents)). The regulations prohibit
9 current or former employees from producing documents or providing testimony in a
10 case where the United States is not a party, unless the appropriate agency official
11 authorizes the disclosure. 28 C.F.R. § 16.22(a). The Touhy regulations specifically
12 apply when the agency is a non-party subject to a state court subpoena, 28 C.F.R. §
13 16.21(a), because the “principles of sovereign immunity preclude actions to enforce
14 state-court subpoenas against the United States.” Kwan Fai Mak v. FBI, 252 F.3d
15 1089, 1092 (9th Cir. 2001) (affirming judgment in favor of government because
16 plaintiff had not followed FBI’s Touhy regulations).

17 **B. Analysis**

18 Defendants declined Plaintiff’s request for documents for three reasons. First,
19 the request would reveal how, when and why the FBI goes about investigating
20 pornography websites. Second, producing the documents would not be an efficient use
21 of taxpayer dollars and is work more appropriate for an expert or investigator. Lastly,
22 they assert that the requests are unduly burdensome and seek information not relevant
23 to the underlying state criminal case. Plaintiff argues that the reasons provided are
24 conclusory and not supported by any evidence. If the Court is inclined to grant
25 summary judgment in favor of Defendants, Plaintiff asks the Court to defer its ruling
26 in order to allow time for him to conduct discovery on these issues.

27 First, the Court notes that the standard on summary judgment in a standard civil
28 case is different than reviewing an agency decision in an APA case. See Occidental

1 Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir.1985) (in and administrative proceeding
 2 “there are no disputed facts that the district court must resolve.”) When reviewing an
 3 agency action under the APA, “the district judge sits as an appellate tribunal.”
 4 American Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001). As
 5 such, discovery is generally not allowed under the APA as the Court’s review is limited
 6 to the administrative record. See Animal Defense Council, 840 F.2d at 1436. “[T]he
 7 function of the district court is to determine whether or not as a matter of law the
 8 evidence in the administrative record permitted the agency to make the decision it did.”
 9 City & Cnty. Of San Francisco v. U.S., 130 F.3d 873, 877 (9th Cir. 1997) (quoting
 10 Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir.1985)). Therefore, Plaintiff’s
 11 assertion that Defendants failed to provide evidence to support their motion is without
 12 merit as well as his request for discovery⁴ in this case.

13 First, Defendants declined disclosure under 28 C.F.R. § 16.26(b)(5) arguing that
 14 disclosing information about whether “iceporn.com” ever contained images of child
 15 pornography would reveal how, when and why the FBI goes about determining
 16 whether a website contains child pornography which would impair the effectiveness
 17 of the FBI’s investigations. Plaintiff disagrees and argues he does not seek information
 18 of the FBI’s investigative methods or techniques.

19 The U.S. Attorney is not authorized to approve a disclosure that “would reveal
 20 investigatory records compiled for law enforcement purposes, and would interfere with
 21 enforcement proceedings or disclose investigative techniques and procedures the
 22 effectiveness of which would thereby be impaired.” 28 C.F.R. § 16.26(b)(5). Under
 23 this section, the agency may assert a “qualified privilege for certain information related
 24 to law enforcement activities.” Cabral v. U.S. Dep’t of Justice, 587 F.3d 13, 23 (1st
 25 Cir. 2009) (citing Commonwealth of Puerto Rico v. U.S., 490 F.3d 50, 62 (1st Cir.
 26

27 ⁴The discovery Plaintiff seeks is to propound simple yes/no interrogatories to
 28 Defendants as to the documents he requested. (Dkt. No. 23 at 6.) Plaintiff does not
 seek discovery based on any of the exceptions to the general rule that the Court’s
 review is limited to the administrative record.

1 2007)). Courts “have recognized that the privilege may be applied in order to ensure
2 the efficacy of investigative techniques in future cases.” Shah v. Dep’t of Justice, 89
3 F. Supp. 3d 1074, 1080 (D. Nev. Feb. 2, 2015) (citing Commonwealth of Puerto Rico,
4 490 F.3d at 64).

5 In Shah, the DOJ refused to disclose charts, graphs, and raw data associated with
6 a polygraph examination conducted upon Plaintiff by the FBI in which Plaintiff was
7 facing state criminal charges. Shah, 89 F. Supp. 3d at 1076. The FBI explained that
8 releasing the data under the polygraph examination would “significantly risk
9 circumvention of the FBI’s law enforcement ability, by arming those intent on breaking
10 the law with information about FBI polygraph questions, charts, reports, and
11 equipment.” Id. at 1077. The “efficacy of polygraph examinations is substantially
12 reliant on presenting questions in specific patterns and sequences that are not known
13 to the examinee, and that publicly disclosing the underlying questions, charts, and
14 graphs would allow future examinees to employ effective countermeasures against
15 polygraph tests.” Id.

16 Here, Defendants’ letter to Plaintiff explained that to disclose information about
17 whether “iceporn.com” ever contained child pornography images would reveal “how
18 and when and why the FBI goes about determining whether a website contains child
19 pornography, impairing the effectiveness of the FBI’s investigations.” (Dkt. No. 20-2,
20 Hoffman Decl., Ex. D at 38.) Plaintiff disputes Defendants’ argument contending that
21 all he merely seeks is a yes/no answer and not “how, why and when” the FBI obtained
22 the information and not asking the FBI to collect and analyze investigative data for
23 him. (Dkt. No. 22 at 7.)

24 A review of the nine/ten specific requests reveal that the answers Plaintiff seeks
25 are not merely yes/no answers but would involve some type of explanation that would
26 disclose investigative techniques and/or investigatory records compiled for law
27 enforcement purposes. Defendant’s assessment that disclosing whether “iceporn.com”
28 ever contained child pornographic images would reveal how, when and why the FBI

1 determines whether a website contains child pornography and could jeopardize future
2 investigations is a rational one based on the facts presented.

3 Next, Defendants denied Plaintiff's Touhy request because compliance would
4 not be the best use of federal taxpayer dollars and the documents he is requesting is
5 more suitable for an investigator or expert witness. For example, Defendants
6 explained that Request Nos. 5, 7, 8, 9, and 10 ask the FBI to conduct work in defending
7 his criminal case which is more appropriate for Plaintiff's investigator or expert
8 witnesses. (Dkt. No. 20-2, Hoffman Decl., Ex. D at 37.) Stated another way,
9 responding to Plaintiff's requests would divert FBI resources away from its duties as
10 federal law enforcement officers "funded by the taxpaying public for that purpose, to
11 other purposes not directly related to those duties." Id.

12 "When an agency is not a party to an action, its choice of whether or not to
13 comply with a third-party subpoena is essentially a policy decision about the best use
14 of the agency's resources." COMSAT Corp., 190 F.3d at 278. Courts should defer to
15 the agency on how to best use its resources as they are in the best position to determine
16 how much time and effort would be involved considering its ability to comply. See
17 id. ("we defer to the agency's judgment, recognizing as we do that 'federal
18 judges—who have no constituency—have a duty to respect legitimate policy choices
19 made by those who do . . . [because] [o]ur Constitution vests such responsibilities in
20 the political branches.'"); City of Ashland v. Schaefer, Civ. No. 08-3048-CL, 2008 WL
21 2944681, at *6 (D. Or., July 31, 2008) ("[T]he USDA is in the best position to
22 determine the time and effort involved in preparing the employees for their depositions
23 and testimony and how that time commitment might hamper their ability to fulfill their
24 duties. Thus, the Court cannot find that the USDA's decision regarding the testimony's
25 undue interference with the employees' [duties] was unreasonable or irrational.");
26 Bobreski v. U.S. Env'tl. Prot. Agency, 284 F. Supp. 2d 67, 80 (D.D.C. 2003) ("The
27 plaintiff may not agree with EPA's assessment and its denial of the plaintiff's request.
28 But neither the plaintiff nor this court may substitute their judgment for that of the

1 EPA. Because EPA made a rational decision in accordance with its Touhy regulations,
2 the court determines that EPA's denial of the plaintiff's request for the inspector's
3 testimony was not arbitrary and capricious.").

4 In City of Ashland, while the party seeking the testimony of a USDA employee
5 argued that the USDA provided no evidence of how providing testimony would
6 interfere with the subpoenaed employee's duties, the court noted that may be true, but
7 the Court deferred to the USDA's assessment as to whether compliance would be
8 burdensome as the USDA is in the best position to determine the time and effort
9 involved in preparing for the depositions and whether that time commitment would
10 hamper their ability to perform their duties. City of Ashland, 2008 WL 2944681, at *6.

11 In another case, the Third Circuit, affirming the district court's grant of summary
12 judgment in favor of the EPA under the APA, stated that while it would not have
13 necessarily interpreted the EPA's interest as narrowly as it had done, the court
14 concluded that the EPA did not abuse its discretion in deciding that its interests in the
15 employees' time spent on agency business which was also taxpayer's money
16 outweighed the interests of a party in a private litigation to which the EPA was not a
17 party. Davis Enters. v. U.S. E.P.A., 877 F.2d 1181, 1188 (3d Cir. 1989).

18 Here, the Court defers to the DOJ's determination that answering Plaintiff's
19 numerous requests would divert FBI employees from their primary duties as law
20 enforcement officers to other non-law enforcement matters. Moreover, the requested
21 documents are more appropriate for an investigator or expert witness in Plaintiff's case
22 and it is not clear why such information could not be obtained by them. Defendants'
23 decision was based a rational connection between the facts presented and the decision
24 made.

25 Finally, Defendants argue, under 28 C.F.R. § 16.26(a), the requests are unduly
26 burdensome and seek information not relevant to his state criminal case. (Dkt. No. 20-
27 2, Hoffman Decl., Ex. D at 37.) As an example, the DOJ notes that Request Nos. 8 and
28 9 ask for information about websites that have 18 U.S.C. § 2257 disclaimers which

1 could be potentially numerous and then ask whether those disclaimers are true and then
2 ask for a statistical analysis of the results. According to Defendants, not only would
3 the request be unduly burdensome, the information is not relevant and possibly not
4 admissible as evidence at his trial and therefore, not appropriate under the rules of
5 procedure under § 16.26(a)(1).

6 28 C.F.R. § 16.26(a)(1) provides that the DOJ should consider “[w]hether such
7 disclosure is appropriate under the rules of procedure governing the case or matter in
8 which the demand arose” 28 C.F.R. § 16.26(a)(1). Denial is appropriate if the
9 requests are overbroad and “not directly relevant to the primary issue at hand.” Cabral,
10 587 F.3d at 23.

11 The Court concludes that the DOJ’s reasons for denying Plaintiff’s requests
12 because they are not only overbroad and unduly burdensome but are also not relevant
13 to the issues in his underlying criminal case were a rational one.

14 In summary, the DOJ’s denial of Plaintiff’s requests was not arbitrary or
15 capricious, an abuse of discretion or contrary to law. See 5 U.S.C. § 706(2)(A).

16 In his reply, Plaintiff raises a new issue alleging a violation of the APA because
17 the decision was contrary to his constitutional right to exculpatory evidence under
18 Brady. As an initial matter, courts may not consider arguments raised for the first time
19 in the reply brief. Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 1997).

20 To the extent Plaintiff is proceeding pro se, the Court will consider the new
21 argument. However, even if the Court considered Plaintiff’s argument of an alleged
22 Brady violation to challenge the DOJ’s decision, it is without merit. A prosecutor’s
23 failure to disclose favorable evidence to an accused “violates due process where the
24 evidence is material either to guilt or to punishment, irrespective of the good faith or
25 bad faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 87 (1963). A Brady
26 violation occurs if “there is a reasonable probability that, had the evidence been
27 disclosed to the defense, the result of the proceeding would have been different.”
28 United States v. Bagley, 473 U.S. 667, 682 (1985). “Merely withholding evidence


1 useful to a defendant does not violate the Brady rule.” Kwan Fai Mak, 252 F.3d at
 2 1094. In addition, it is unresolved whether Brady imposes a duty on the federal
 3 government to provide information to a state court defendant. Id. at 1093. Kwan Fai
 4 Mak is an APA case where the FBI declined to disclose allegedly useful information
 5 in plaintiff’s state capital sentencing proceedings and the Ninth Circuit held that the
 6 Brady allegation was premature. Id. The Ninth Circuit noted in the early stage of a
 7 criminal proceeding, it is not possible to determine whether withholding the
 8 information in question will create a Brady violation because it is not clear how
 9 important the withheld information will be. Id. Similarly, in this case, it is not clear
 10 how important the withheld information is and the Court cannot determine the impact
 11 of an alleged Brady violation. Therefore, assuming Brady imposes a duty on the FBI,
 12 Plaintiff’s newly raised Brady allegation is premature and without merit at this time.
 13 See id.

14 Conclusion

15 Based on the above, the Court GRANTS Defendants’ motion for summary
 16 judgment and DENIES Plaintiff’s motion for summary judgment.⁵ The hearing set for
 17 March 10, 2017 shall be vacated.

18 IT IS SO ORDERED.

19
 20 DATED: March 3, 2017

21 
 22 HON. GONZALO P. CURIEL
 23 United States District Judge
 24
 25

26 ⁵In his opposition, Plaintiff asserts that he sent a FOIA request to the FBI in
 27 December 2016. (Dkt. No. 23, Benhoff Decl. ¶ 2; id., Ex. A at 11.) Plaintiff intends
 28 to seek leave to amend his complaint once the FOIA request is denied. Since the Court
 is closing the case as it is granting Defendants’ motion for summary judgment, Plaintiff
 may file another Complaint seeking relief under FOIA.